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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1989

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INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS, AFL-CIO, *et al.*,

—v.— *Petitioners,*

THE LONG ISLAND RAILROAD COMPANY, *et al.*,

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**BRIEF IN OPPOSITION TO A PETITION FOR A  
WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

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17 PR

## TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	ii
REASONS FOR DENYING THE PETITION .....	1
I. The Injunction Preserves And Effectuates The RLA's Mandatory Dispute Resolution Proce- dures .....	2
II. There Is No Split Among The Circuits As To Whether A Sympathy Strike That Raises A Minor Dispute May Be Enjoined.....	5
III. The Court Of Appeals Correctly Refused To Apply NLRA Principles.....	9
CONCLUSION .....	12

## TABLE OF AUTHORITIES

Cases:	PAGE
<i>Air Line Pilots Ass'n v. Eastern Air Lines</i> , 863 F.2d 891 (D.C. Cir. 1988).....	6, 7
<i>Brotherhood of Locomotive Firemen v. Florida East Coast Ry.</i> , 346 F.2d 673 (5th Cir. 1965) .....	7, 8
<i>Brotherhood of R.R. Trainmen v. Chicago River &amp; Indi- ana R.R.</i> , 353 U.S. 30 (1957) .....	3, 4, 9
<i>Buffalo Forge Co. v. United Steel Workers</i> , 428 U.S. 397 (1976) .....	10, 11
<i>Burlington Northern R.R. v. Brotherhood of Mainte- nance of Way Employes</i> , 481 U.S. 429 (1987).....	2, 3, 4
<i>Chicago &amp; North Western Ry. v. United Transportation Union</i> , 402 U.S. 570 (1971) .....	2-3, 4
<i>Consolidated Rail Corp. v. Railway Labor Executives' Ass'n</i> , 109 S. Ct. 2477 (1989) .....	2, 3, 7
<i>CSX Transportation, Inc. v. United Transportation Union</i> , 879 F.2d 990 (2d Cir. 1989) .....	3, 7
<i>Detroit &amp; Toledo Shore Line R.R. v. United Transporta- tion Union</i> , 396 U.S. 142 (1969) .....	2, 7
<i>Duplex Printing Press Co. v. Deering</i> , 254 U.S. 443 (1921) .....	3, 4
<i>Eastern Air Lines v. Air Line Pilots Ass'n</i> , No. 89-5229 (11th Cir. March 24, 1989).....	7
<i>International Ass'n of Machinists v. Airline Industrial Relations Conference</i> , Civ. 89-0514 (D.D.C. March 16, 1989) .....	6

	PAGE
<i>International Ass'n of Machinists v. Eastern Air Lines</i> , 826 F.2d 1141 (1st Cir. 1987).....	6, 7
<i>Local 1395, International Brotherhood of Electrical Workers v. NLRB</i> , 797 F.2d 1027 (D.C. Cir. 1986) ..	9
<i>Long Island R.R. v. International Ass'n of Machinists</i> , 874 F.2d 901 (2d Cir. 1989).....	1
<i>Northwest Airlines v. Air Line Pilots Ass'n</i> , 442 F.2d 246 (8th Cir. 1970), <i>aff'd</i> , 442 F.2d 251 (8th Cir.), <i>cert. denied</i> , 404 U.S. 871 (1971).....	6
<i>Northwest Airlines v. International Ass'n of Machinists</i> , 712 F. Supp. 732 (D. Minn. 1989) .....	6
<i>Ozark Air Lines v. Air Line Pilots Ass'n</i> , 361 F. Supp. 198 (E.D. Mo.), <i>vacated on application of the parties</i> , 83 L.R.R.M. (BNA) 2923 (E.D. Mo. 1973) .....	6
<i>Puerto Rico International Airlines v. Air Line Pilots Ass'n</i> , 86 L.R.R.M. (BNA) 3189 (D.P.R. 1974) .....	6
<i>Southeastern Pa. Transportation Authority v. Brother- hood of R.R. Signalmen</i> , 882 F.2d 778 (3d Cir. 1989) .....	6, 10, 11
<i>Texas &amp; New Orleans R.R. v. Brotherhood of Railway &amp; Steamship Clerks</i> , 281 U.S. 548 (1930) .....	7
<i>Trans International Airlines v. International Brother- hood of Teamsters</i> , 650 F.2d 949 (9th Cir. 1980), <i>cert. denied</i> , 449 U.S. 1110 (1981).....	6, 11
<i>Trans World Airlines v. International Ass'n of Machin- ists</i> , 629 F. Supp. 1554 (W.D. Mo. 1986).....	4, 6, 11
<i>Trans World Airlines v. Independent Federation of Flight Attendants</i> , 109 S. Ct. 1225 (1989).....	5, 9
<i>Western Maryland R.R. v. System Bd. of Adjustment</i> , 465 F. Supp. 963 (D. Md. 1979).....	6

<i>Wien Air Alaska v. Teamsters</i> , 93 L.R.R.M. (BNA) 2934 (D. Alaska 1976) .....	11
--	----

### Statutes:

#### National Labor Relations Act

Section 7, 29 U.S.C. § 157.....	9
---------------------------------	---

Section 13, 29 U.S.C. § 163.....	9
----------------------------------	---

Norris-LaGuardia Act, 29 U.S.C. § 101, <i>et seq.</i> .....	2
---	---

#### Railway Labor Act

Section 1a, 45 U.S.C. § 151(a) .....	2, 7
--------------------------------------	------

Section 2, First, 45 U.S.C. § 152, First.....	2, 7, 11
---	----------

Section 3, 45 U.S.C. § 153.....	3, 11
---------------------------------	-------

Section 5, First, 45 U.S.C. § 155, First .....	3
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The Long Island Rail Road Company and Metro-North Commuter Railroad Company (the "Railroads") oppose the petition filed by the International Association of Machinists, *et al.* (the "Unions") for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit in *Long Island R.R. v. International Ass'n of Machinists*, 874 F.2d 901 (2d Cir. 1989).

**REASONS FOR DENYING THE PETITION**

Concluding that the parties' collective bargaining agreements are reasonably susceptible to the Railroads' interpretation that sympathy strikes are not permitted (Pet. App. 25a), the Court of Appeals held that the District Court properly enjoined—pending arbitration—the Unions' threatened strike in sympathy with employees of Eastern Airlines. (Pet. App.

25a—26a)<sup>1</sup> That decision is consistent both with the decisions of this Court construing the RLA's "minor" dispute provisions, including *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477 (1989), and with every other circuit court opinion that has decided whether a sympathy strike that raised a minor dispute could be enjoined pending arbitration.

The Petition does not challenge the conclusion that the threatened sympathy strike raises an arbitrable minor dispute. Instead, the Unions claim that the preliminary injunction is, "in everything but name, an across-the-board proscription of sympathy strikes in the railroad and airline industries" (Pet. 6) that requires review by this Court to resolve a so-called conflict among the circuits. The Unions claim also that the decision below conflicts with *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987), and with cases decided under the National Labor Relations Act. These claims are without merit and do not warrant further review.

# **I. THE INJUNCTION PRESERVES AND EFFECTUATES THE RLA'S MANDATORY DISPUTE RESOLUTION PROCEDURES**

In order "to avoid any interruption to commerce or to the operation of any carrier therein," 45 U.S.C. §§ 151a(1), 152, First, the RLA prohibits employees and their unions from engaging in self-help without first exhausting one of the Act's mandatory dispute resolution procedures. See *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. at 2480-81; *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 149-50 (1969). A strike called before exhaustion of the applicable dispute resolution procedure may be enjoined notwithstanding the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* See *Chicago & North Western Ry. v. United Transportation Union*, 402 U.S. 570 (1971); *Brother-*

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1 References to pages in petitioners' appendix are designated as "Pet. App. \_\_\_\_." References to pages in the petition are designated as "Pet. \_\_\_\_."

hood of *R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957).

Which dispute resolution procedure is applicable depends on the nature of the dispute. "Major" disputes, which typically " 'relate[ ] to disputes over the formation of collective agreements or efforts to secure them,' " <sup>2</sup> must be resolved through a lengthy process of bargaining and mediation. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. at 2480 (citation omitted).

"Minor" disputes, on the other hand, arise out of the interpretation or application of a collective bargaining agreement, and must be resolved through binding arbitration. 45 U.S.C. § 153. If a claim "is arguably justified by the terms of the parties' agreement (*i.e.*, the claim is neither obviously insubstantial or frivolous, nor made in bad faith)," then the dispute is minor and subject to arbitration. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. at 2484.

Here, the Court of Appeals merely applied the "reasonably susceptible" test and upheld the District Court's conclusion that: (i) the parties' collective bargaining agreements are reasonably susceptible to the interpretation that sympathy strikes are not permitted; (ii) a minor dispute exists as to whether those agreements permit sympathy strikes; and (iii) the Unions were properly enjoined from striking pending arbitration of that dispute. (Pet. App. 23a-25a)

The Unions' characterization of that analysis and decision as "a return to the . . . regime" of *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (Pet. 6), could hardly be less apt. In *Duplex Printing*, decided before enactment of either the RLA or the NLRA, the Court held that a secondary boycott could be enjoined as an antitrust violation. That decision was nullified by the Norris-LaGuardia Act. See *Burlington North-*

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2 Major disputes also include, and the National Mediation Board ("NMB") has jurisdiction to mediate, any other dispute that is not a minor dispute. 45 U.S.C. § 155, First; *CSX Transportation, Inc. v. United Transportation Union*, 879 F.2d 990, 996 n.4 (2d Cir. 1989).

*ern R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 438-39 (1987).

The decision below does not enjoin lawful secondary activity; indeed such activity is expressly excluded from the scope of the injunction. (Pet. App. 27a) Nor does the decision below permanently enjoin the threatened sympathy strike. It merely preserves and effectuates the Act's dispute resolution processes—in this case arbitration—by enjoining the threatened strike pending arbitration. The decision to uphold that injunction bears no more resemblance to *Duplex Printing* than does *Chicago & North Western Ry.*, *Chicago River*, or any other decision authorizing injunctive relief to enforce the RLA's mandatory dispute resolution procedures.

The claim that the decision of the Court of Appeals constitutes "an across-the-board proscription of sympathy strikes" (Pet. 6) is also a gross exaggeration. The Unions have been enjoined from engaging in a sympathy strike only until an arbitrator determines that their collective bargaining agreements permit them to do so. They are (and at all times during the past seven months have been) free to arbitrate—and to seek expedited arbitration, see *Trans World Airlines v. International Ass'n of Machinists*, 629 F. Supp. 1554, 1562 (W.D. Mo. 1986)—but have chosen not to exercise that right. The effect of the injunction on the Unions' alleged "right" to strike is certainly not substantial enough to warrant review by this Court.

The assertion that the Court of Appeals' decision "cannot be squared" with *Burlington Northern* because it supposedly nullifies the effect of secondary picketing by striking Eastern employees (Pet. 15) is simply untrue. The Unions treat *Burlington Northern's* holding, that courts may not enjoin secondary picketing by employees who have exhausted the major dispute procedures, as a guarantee to such employees of a right to have their picket lines honored. *Burlington Northern*, however, says nothing that suggests—and certainly does not hold—that employees of a secondary carrier may honor a picket line if doing so "would independently violate [their] own congres-

sionally mandated obligations under the RLA.” (Pet. App. 28a).<sup>3</sup>

The Court of Appeals decision, moreover, reserves to *individual* employees of the Railroads the right to honor secondary picket lines. The court explicitly observed that “individual employees represented by the Unions are not parties to these actions, and may be subjected to the restraints of the injunctions only if ‘in active concert or participation’ with parties thereto.” (Pet. App. 30a) In addition, the court noted that the striking Eastern employees “may still enlist for support third parties not subject to the strictures of the RLA.” (Pet. App. 27a).

In short, the decision below does not limit the striking Eastern employees to “an enfeebled ‘right’ to publicize a labor dispute to members of the general traveling public.” (Pet. 15) The decision carefully considers and gives effect both to the rights of employees engaged in a lawful strike, and to the obligations imposed by the RLA on employees who are bound to refrain from striking because *they* have not exhausted the statute’s procedures. There is no need to review that decision because it is logical, sensible and fully consistent with this Court’s prior decisions.

## **II. THERE IS NO SPLIT AMONG THE CIRCUITS AS TO WHETHER A SYMPATHY STRIKE THAT RAISES A MINOR DISPUTE MAY BE ENJOINED**

The Court of Appeals decision is consistent with the decision of every other circuit court that has decided whether a sympathy strike that raises a minor dispute may be enjoined pending

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3 The Unions’ reliance on *Trans World Airlines v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989), is also misplaced. That case supports only the proposition that the RLA does not regulate the conduct of either party *after* its dispute resolution procedures have been exhausted. There is no suggestion that a union that has not exhausted those procedures may ignore them simply because another union is engaged in lawful picketing.

arbitration.<sup>4</sup> See *Southeastern Pa. Transportation Authority v. Brotherhood of R.R. Signalmen*, 882 F.2d 778 (3d Cir. 1989); *Trans International Airlines v. International Brotherhood of Teamsters*, 650 F.2d 949 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981); *Northwest Airlines v. Air Line Pilots Ass'n*, 442 F.2d 246 (8th Cir. 1970), *aff'd*, 442 F.2d 251 (8th Cir.), *cert. denied*, 404 U.S. 871 (1971).

The Unions, therefore, seek to rephrase the question presented in a manner calculated to create the illusion of a split among the circuits. Posing the question, "[w]hether the federal courts have, *in general*, the authority to enter status quo injunctions, pending arbitration, against actions alleged to be in breach of an RLA collective bargaining agreement" (Pet. 1; emphasis added), the Unions then rely on decisions holding that an employer may not be enjoined from changing working conditions pending arbitration: *Air Line Pilots Ass'n v. Eastern Air Lines*, 863 F.2d 891 (D.C. Cir. 1988) and *International Ass'n of Machinists v. Eastern Air Lines*, 826 F.2d 1141 (1st Cir. 1987).<sup>5</sup> These decisions, the Unions claim, are in conflict with the decision of the court below.

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4 A number of district courts have also issued injunctions (pending arbitration) against sympathy strikes alleged to be in violation of a collective bargaining agreement. *Northwest Airlines v. International Ass'n of Machinists*, 712 F. Supp. 732 (D. Minn. 1989); *International Ass'n of Machinists v. Airline Industrial Relations Conference*, Civ. 89-0514 (D.D.C. March 16, 1989) (currently *sub judice* on appeal to the D.C. Circuit); *Trans World Airlines v. International Ass'n of Machinists*, 629 F. Supp. 1554 (W.D. Mo. 1986); *Puerto Rico International Airlines v. Air Line Pilots Ass'n*, 86 L.R.R.M. (BNA) 3189 (D.P.R. 1974); *Ozark Air Lines v. Air Line Pilots Ass'n*, 361 F. Supp. 198 (E.D. Mo.), *vacated on application of the parties*, 83 L.R.R.M. (BNA) 2923 (E.D. Mo. 1973). But see *Western Maryland R.R. v. System Bd. of Adjustment*, 465 F. Supp. 963 (D. Md. 1979).

5 The only discussion in either of these cases about a court's authority to enjoin a *strike*—as opposed to unilateral employer action—in the context of a minor dispute was the observation in *International Ass'n of Machinists v. Eastern Air Lines* that a court has authority "to grant this relief only when a union has struck and not otherwise." 826 F.2d at 1149.

Regardless of whether carrier action may be enjoined pending arbitration,<sup>6</sup> that issue has nothing at all to do with whether strikes may be enjoined. As the Unions reluctantly concede, courts simply do not equate strike injunctions with injunctions against other kinds of contract violations (Pet. 13-14 n.6), and properly so. The express and primary purpose of the RLA is "[t]o avoid any interruption to commerce or to the operation of any carrier therein." 45 U.S.C. §§ 151a(1), 152, First. See *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142, 148 n.13 (1969) (citation omitted) ("the major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes'"); *Texas & New Orleans R.R. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 565 (1930) ("The avoidance of industrial strife, by conference between the authorized representatives of employer and employee" is the RLA's "major objective"). The considerations that warrant injunctive relief against sympathy strikes simply have no relevance to injunctions against employer actions, and none of the decisions cited in the Petition suggests otherwise.

Nor are the decisions in *Eastern Air Lines v. Air Line Pilots Ass'n*, No. 89-5229 (11th Cir. March 24, 1989), and *Brotherhood of Locomotive Firemen v. Florida East Coast Ry.*, 346 F.2d 673 (5th Cir. 1965), in conflict with the decision below. Neither decision holds "that the federal courts . . . do not have the authority to enjoin sympathy strikes alleged to be in breach of contract." (Pet. 10)

In *Eastern Airlines v. Air Line Pilots Ass'n*, the Eleventh Circuit reversed the denial of Eastern's application for an injunc-

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6 This Court "never has recognized a general statutory obligation on the part of an employer to maintain the status quo pending [arbitration]." *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. at 2481. The lower courts, however, have differed on whether a status quo injunction may be issued against an employer in a minor dispute. Compare *CSX Transportation, Inc. v. United Transportation Union*, 879 F.2d 990, 1004 n.10 (2d Cir. 1989) with *Air Line Pilots Ass'n v. Eastern Air Lines*, 863 F.2d 891 (D.C. Cir. 1988) and *International Ass'n of Machinists v. Eastern Air Lines*, 826 F.2d 1141 (1st Cir. 1987).

tion prohibiting a strike by pilots who were seeking a new contract and had not exhausted the major dispute resolution procedures. The case was remanded to the district court to determine whether the strike was primary, *i.e.*, a strike in support of the pilots bargaining demands, or in sympathy with the IAM, which had been released from mediation.

Although the Eleventh Circuit mentioned that, “[o]rdinarily, it is lawful to honor picket lines,” the court did not decide in its three page, unreported *per curiam* order whether Eastern had shown that the strike by its pilots raised a minor dispute, or whether an injunction should issue where, as here, the carrier has shown that its collective bargaining agreements are reasonably susceptible to the interpretation that sympathy strikes are not permitted.

*Brotherhood of Locomotive Firemen v. Florida East Coast Ry.*, 346 F.2d 673 (5th Cir. 1965), is equally inapposite to whether a split in the circuits exists; it too did not decide whether the sympathy strike at issue raised a minor dispute. The plaintiff, a railroad whose employees were engaged in an economic strike, sought an injunction against a *secondary employer* (a port authority) and its employees (the sympathy strikers). Although the railroad argued that the sympathy strike was enjoinable because it involved a minor dispute between the Port Authority and its employees, the Court denied the injunction, noting that “[i]t is the [railroad] that seeks the injunction, not the Port Authority,” *id.* at 676; that neither the Port Authority nor its employees had sought arbitration; and that an injunction thus was not necessary “to preserve the jurisdiction of the Board over any minor dispute between the Port Authority and its employees . . . .” *Id.*

In sum, this Court has held that courts may enjoin strikes pending arbitration, and there is no split among the circuits concerning the application of that principle to sympathy strikes that give rise to minor disputes.

### III. THE COURT OF APPEALS CORRECTLY REFUSED TO APPLY NLRA PRINCIPLES

"The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the [NLRA]." *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 31-32 n.2 (1957). See also *Trans World Airlines v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225, 1233 (1989) (citations omitted) (the NLRA "'cannot be imported wholesale into the railway labor arena'" and "'even rough analogies must be drawn circum-spectly with due regard for the many differences between the statutory schemes'"). The differences between the two statutes are most pronounced in the way that they each deal with strikes.

While the NLRA specifically protects both the right to engage in "concerted activity," 29 U.S.C. § 157, and the right to strike, 29 U.S.C. § 163, no such general rights are protected by the RLA. On the contrary, the RLA is designed to prevent strikes and prescribes detailed and mandatory procedures for the peaceful resolution of all labor disputes. (See pp. 2-3, *supra*)

The "clear and unmistakable waiver" doctrine advanced by the Unions (Pet. 16) is inimical to the RLA scheme. As the court observed in *Local 1395, International Brotherhood of Electrical Workers v. NLRB*, 797 F.2d 1027, 1029 (D.C. Cir. 1986) (citations omitted), the doctrine flows from the rights created by Section 7 of the NLRA:

Under Section 7 of the [NLRA] . . . employees enjoy the right to observe lawful picket lines that they encounter in the course of their duties . . . . This right, however, may be waived by employees in collective bargaining agreements . . . . Still, waiver of the right to engage in sympathy strikes, like waiver of other rights under the Act, must be "clear and unmistakable."

The RLA, however, contains no analogue to Section 7. None of the cases cited by the Unions support the proposition that "[i]n the Railway Labor Act context, as in the National Labor Relations Act context, the proper rule is that a contractual

waiver of this basic statutory right [to engage in a sympathy strike] 'must be clear and unmistakable.' " (Pet. 15-16) Under the RLA, unions that have not exhausted the applicable dispute resolution procedure have no such "right" to waive.

As the Third Circuit observed in *Southeastern Pa. Transportation Authority v. Brotherhood of R.R. Signalmen*, 882 F.2d 778 (3d Cir. 1989), application of the "clear and unmistakable" standard to minor disputes would also conflict with the standard approved in *Consolidated Rail* for determining whether a minor dispute exists:

[B]orrowing the "clear and unmistakable" standard from NLRA precedent is wholly inappropriate in the circumstance of the instant case. In *Consolidated Rail* the Supreme Court . . . stated that the appropriate standard for determining whether a minor dispute exists is whether the "disputed action of one of the parties can arguably be justified by the existing agreement." . . . A requirement that SEPTA prove that the collective bargaining agreements clearly and unmistakably indicate that the unions waived their right to engage in a sympathy strike is fundamentally at odds with the standard set forth by the Supreme Court. As such, we conclude that SEPTA need only meet its relatively light burden of proving that the collective bargaining agreements can arguably be read to prohibit the unions from engaging in sympathy strike activity in order to categorize the instant dispute as a "minor" one within the parlance of the RLA.

882 F.2d at 783-84 (citations omitted).

The Unions' passing reference to *Buffalo Forge Co. v. United Steel Workers*, 428 U.S. 397 (1976), is likewise inapposite. *Buffalo Forge* holds that, under the NLRA, a sympathy strike cannot be enjoined pending arbitration because the NLRA leaves resolution of contractual disputes to the parties' own dispute resolution procedure, and because "there is no general federal anti-strike policy." 428 U.S. at 409.

Unlike the NLRA, however, the RLA is expressly designed to *prevent* strikes. And, unlike the NLRA, the RLA prescribes a detailed procedure for resolving disputes (without resort to self-help) that *requires* the parties: (1) to submit disputes over the interpretation or application of collective bargaining agreements to arbitration, 45 U.S.C. § 153; and (2) to exert every reasonable effort to resolve disputes and to make and maintain agreements in order to avoid any interruption to commerce or to the operation of any carrier. 45 U.S.C. § 152, First. All of the circuit courts that have addressed the issue have held that *Buffalo Forge* "is . . . inapposite in the RLA context." (Pet. App. 26a) *Southeastern Pa. Transportation Authority v. Brotherhood of R.R. Signalmen*, 882 F.2d 778 (3d Cir. 1989); *Trans International Airlines v. International Brotherhood of Teamsters*, 650 F.2d 949, 965-66 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981). See also *Trans World Airlines v. International Ass'n of Machinists*, 629 F. Supp. 1554, 1557 (W.D. Mo. 1986); *Wien Air Alaska v. Teamsters*, 93 L.R.R.M. (BNA) 2934 (D. Alaska 1976).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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